

Workers' Compensation A Classy Line !

CLASSIFICATION:

What is workers' compensation without classification? Rates are tied to class codes, so without classification there would be no premium base. Today, in other areas of life, we try to eliminate classification and pigeon holing, but it is a vital component in the workers' compensation system. If we were to eliminate classification, another system would be needed to determine a premium base. Any other such system would most probably identify everyone as being exposed to the same hazard or the most dangerous hazard and that would result in a lot of employers overpaying for their coverage. So, since we do classify business operations, some employers feel pressured to label employees with the lowest rated class code as possible and to call some of their direct employees "independent."

MISCLASSIFICATION OR MISCODING:

For the purposes of workers' compensation, misclassification refers to the practice of incorrectly labeling a direct employee as an independent contractor/sub-contractor, sole proprietor, or partner to a partnership. Miscoding refers to the use of an incorrect class code to identify the duties and functions of an individual or a group of direct employees.

VERMONT'S ACT 142 (effective 07-01-2010):

Although the practice of manipulating classification and class codes is understandable, Vermont's Act 142 (formerly H.647) attempts to eliminate it. The Act speaks less about understanding and more about equity. The Act's intention is to level the playing field, such that every Vermont employer is paying a fair share of the cost to protect its employees. To do so, it requires that employees be classified correctly and that their functions be accurately coded.

[Another way to keep costs to employers down is to be sure that only employees with work-related injuries or illnesses receive statutory benefits.]

The Act then, addresses misclassification, the assignment of class codes and any attempt to secure unjustified benefits. It increases the penalties for anyone who willfully makes a false statement or representation to obtain a benefit for himself or someone else. This includes agents. If you willfully misclassify or miscode for purposes of premium evasion or to secure undeserved benefits, you may well be subjected to these increased penalties.

Note that the statute does say "willful" false statement or representation. Proving willful intent is a difficult thing. Generally, it requires clear and convincing evidence to prove that someone has made a false statement or representation with intent and forethought. This is a higher standard than just proving that there is a preponderance of the evidence, and a lower standard than proving "beyond a reasonable doubt." However, intent can often be demonstrated by the circumstances—the content of the false statement, the context in which it was made, and the known or expected results.

AGENT'S EXPOSURE UNDER THE NEW PENALTIES:

An agent has the same exposure as anyone else, under the statute. However, the agent can take steps to minimize that exposure. Make sure that:

- You know your applicant's operation. Visit the site yourself and consider ordering a site inspection by the carrier or the NCCI.
- You do not rely strictly on a previous application, previous policy data nor a former underwriter's determinations.
- You understand clearly what the Vermont statutes require for an applicant to be considered an independent contractor, sub-contractor, sole proprietor or partner.
- You understand what the statutes require by way of a contract between an independent contractor, sole proprietor or partner.
- You understand clearly who can exclude themselves from coverage.
- You call the Department of Labor with any questions about employee, contractor or sole proprietor status.
- You call your carrier's underwriter with any question about the application and class coding.
- The application is complete and accurate, including notations about anything, which may be unusual.
- You have the application signed by the proposed insured.

CIVIL PENALTIES:

The new penalties for a willful false statement or representation can be quite severe, to wit:

- After notice and the opportunity for a hearing, the offender may be assessed an administrative penalty of not more than \$ 20,000. Formerly, the penalty was not more than \$ 5,000. In this case, an offender can be anyone, including an agent.
- If the offender is also a beneficiary of workers' compensation benefits, she may have to forfeit all or a portion of any right to compensation under workers' compensation provisions of the statute.
- If the offender also happens to be an employer, a violation could prohibit him from contracting with the State for up to three years.

CRIMINAL PENALTIES:

- Criminal penalties have been more clearly defined now, for any person who knowingly and with intent to defraud makes a false statement or representation.
 - If a person violates the statute for the purpose of obtaining, affecting or denying any benefit or payment, either for herself or himself or for any other person, all benefits or payments obtained as a result of the action shall be forfeited and all or a portion of any right to compensation under the statute shall be lost and:
 - For fraud involving \$ 10,000 or more, a person shall be fined not more than \$ 100,000. or imprisoned for not more than three years, or both.

- For fraud involving \$ 10,000 or less, a person shall be fined not more than \$10,000 or imprisoned not more than two years, or both.

EMERGENCY STOP WORK ORDERS

Act 142 also added a new provision permitting the Commissioner of Labor to order a business to cease operations until required workers' compensation insurance is obtained.

- After an investigation by the Commissioner of Labor, if an employer fails to comply with the statutory provisions to provide workers' compensation insurance, the Commissioner shall issue an emergency "stop-work order", until the employer has secured workers' compensation insurance.
- An employer, against whom a stop-work order has been issued, is prohibited from contracting with the State for up to three years.

VIOLATING A STOP WORK ORDER:

- In addition to any other penalties, an employer who violates a stop-work order is subject to:
 - A civil penalty of not more than \$ 5,000. for the first violation and a civil penalty of not more than \$ 10,000. for a second or subsequent violation.
- OR
- A criminal fine of not more than \$ 10,000 or imprisonment for not more than 180 days, or Both.

OTHER CONSEQUENCES FOR INSUREDS

- After a hearing, before the Commissioner of Labor, if an employer is found to have failed to comply with the statutory workers' compensation provisions, even if the failure is not based on a false statement, she shall be assessed an administrative penalty of not more than \$ 100. for the first seven days, during which the employer failed to be in compliance and not more than \$ 150. for every day after that.
- The employer shall also be assessed an administrative penalty of not more than \$ 250. for every day during which the employer fails to secure workers' compensation coverage after an order by the Commissioner. The employer may also be assessed an administrative penalty of not more than \$250. for each employee, who was not covered, for every day during which the employee was not covered.

While no one can guarantee that an agent will not be accused of making a willful false statement or representation; if you follow good business practices, advise your prospective insureds of the consequences of premium evasion and document all of your actions, then you are less likely to find yourself under such an accusation.

NOTE: The author is not an attorney. The information contained or referenced in this article is not intended to constitute and should not be considered legal advice. This article is intended to be used for general informational purposes only and is not to be relied upon or used for any particular purpose.

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